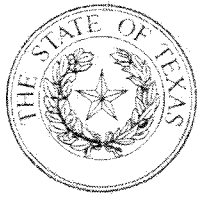


# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

August 13, 2015

Tucker Royall, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-15-1629; TCEQ Docket No. 2013-1005-PWS-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. Hill Top Café, Inc.**

Dear Mr. Royall:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than September 2, 2015. Any replies to exceptions or briefs must be filed in the same manner no later than August 24, 2015.

This matter has been designated **TCEQ Docket No. 2013-1005-PWS-E; SOAH Docket No. 582-15-1629**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Frazee".

Stephanie Frazee  
Administrative Law Judge

SF/mm  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

300 West 15th Street Suite 502

Austin, Texas 78701

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**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)

**STYLE/CASE:** HILL TOP CAFE INC

**SOAH DOCKET NUMBER:** 582-15-1629

**REFERRING AGENCY CASE:** 2013-1005-PWS-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ STEPHANIE FRAZEE**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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TCEQ PUBLIC INTEREST COUNSEL

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TCEQ EXECUTIVE DIRECTOR

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JOHN J. NICHOLS  
PRESIDENT  
HILL TOP CAFÉ, INC.  
10661 NORTH US HWY 87  
DOSS, TX 78618  
(830) 997-8922 (PH)

HILL TOP CAFÉ, INC.

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**SOAH DOCKET NO. 582-15-1629**  
**TCEQ DOCKET NO. 2013-1005-PWS-E**

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
Petitioner**

**v.**

**HILL TOP CAFE, INC.,  
Respondents**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that Hill Top Cafe, Inc. (Respondent) violated the Texas Health and Safety Code and the Texas Administrative Code by failing to meet several public water system requirements. The ED requests that the Commission assess an administrative penalty of \$3,391 for these violations and order Respondent to take corrective actions. Respondent contends that the rule defining public water systems is invalid, that it is not a public water system, and that its water is clean. Without waiving those arguments, Respondent stipulated that if a penalty is imposed, the ED's recommended penalty was calculated properly and is the correct penalty amount for the alleged violations.

The Administrative Law Judge (ALJ) finds that Respondent committed the alleged violations of failing to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection; failing to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014; failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to sample for June 2013 through December 2013; and failing to collect annual nitrate samples and provide the results to the ED for the 2013 monitoring report. The ALJ finds that the ED did not meet his burden of proving Respondent failed to provide plans and specifications to

the ED for review and approval prior to the establishment of a new public water supply and failed to submit well completion data to the ED for review and approval prior to placing a well into service as a public water supply source. The ALJ recommends that the Commission assess a penalty of \$3,291 and order the corrective actions recommended by the ED that are necessary to address the proven violations.

## **II. PROCEDURAL HISTORY**

Notice was not disputed. The attached proposed order contains the required findings of fact and conclusions of law concerning notice.

The hearing convened on June 25, 2015, before ALJ Stephanie Frazee in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by attorney Jake Marx. John Nicholas, Respondent's President and Director, appeared on behalf of Respondent. The record closed on the date of the hearing.

At the hearing, the ALJ granted the ED's motion for sanctions, which prevented Respondent from presenting as evidence documents responsive to the ED's discovery requests but not previously provided to the ED.

## **III. ALLEGED VIOLATIONS**

### **A. Background**

Respondent is a restaurant located at 10661 North U.S. Highway 87 in Doss, Texas. The restaurant has a well that provides drinking water to its customers as well as water for fountain drinks, preparing food and cooking, and washing dishes and hands. Respondent serves approximately 300 customers per day. Thus, Respondent provides water for human consumption

and serves at least 25 people per day for at least 60 days per year. As a result, Respondent is a public water system as that term is defined by 30 Texas Administrative Code § 290.38(69).

Respondent did not disagree with the fact that it is a public water system under the definition in 30 Texas Administrative Code § 290.38(69); nonetheless, Respondent contended that it is not a public water system. Respondent argued that it did not sell water. Respondent further argued that the rule defining public water systems is invalid because it is flawed, unfair, and unconstitutional under the Ninth and Tenth Amendments to the United States Constitution. Specifically, Respondent argued that the United States Environmental Protection Agency has unconstitutionally taken away Texas's rights and dictated to the TCEQ how it should operate. Respondent further argued that its well should be "grandfathered" because it was built before 30 Texas Administrative Code § 290.38(69) came into effect.

The ALJ is not persuaded by these arguments. The State Office of Administrative Hearings (SOAH) does not have jurisdiction over constitutional issues. In accordance with separation of powers, jurisdiction over constitutional questions vests exclusively in the state's judicial branch.<sup>1</sup> Moreover, no evidence was presented on, and the ALJ is unaware of, a grandfathering provision that would apply to Respondent. Finally, the rules do not require selling of water in order to meet the definition of a public water system.<sup>2</sup>

## **B. The ED's Evidence of Violations**

At the hearing, the ED alleged the following violations:

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<sup>1</sup> *City of Dallas v. Stewart*, 361 S.W.3d 562, 579 (Tex. 2012) (noting that "the power of constitutional construction is inherent in, and exclusive to, the judiciary"). SOAH is part of the executive branch rather than the judicial branch.

<sup>2</sup> 30 Tex. Admin. Code § 290.38(69).

1. Failure to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection, in violation of 30 Texas Administrative Code § 290.42(b)(1);
2. Failure to submit plans and specifications to the ED for review and approval prior to the establishment of a new public water supply, in violation of Texas Health and Safety Code § 341.035(a) and 30 Texas Administrative Code § 290.39(e)(1) and (h)(1);
3. Failure to submit well completion data to the ED for review and approval prior to placing a well into service as a public water supply source, in violation of 30 Texas Administrative Code § 290.41(c)(3)(A);
4. Failure to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014 and failure to provide public notification and submit a copy of the public notification to the ED regarding the failure to sample for June 2013 through December 2013, in violation of Texas Health and Safety Code § 341.033(d) and 30 Texas Administrative Code §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(A) and (f); and
5. Failure to collect annual nitrate samples and provide the results to the ED for the 2013 monitoring report, in violation of 30 Texas Administrative Code § 290.106(c)(6).

In support of its allegations, the ED offered as evidence several documents and the testimony of Stacy Tanner, a TCEQ environmental investigator, and James Beauchamp, Special Assistant in the TCEQ Public Drinking Water Program. Michaelle Garza, the TCEQ enforcement coordinator, testified regarding a violation that was added during the Enforcement Division's review of the case, as well as the ED's recommended penalty and corrective actions.

1. **Violations 1 and 3 - Failure to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection and failure to submit well completion data to the ED for review and approval prior to placing a well into service as a public water supply source.**

Ms. Tanner testified regarding her visit to Respondent's restaurant and her investigation report. She investigated Respondent in response to a complaint from the Gillespie County

Health Department alleging that Respondent was operating a public water system. Ms. Tanner found that Respondent was operating as a transient noncommunity public water supply.<sup>3</sup> Ms. Tanner testified that Mr. Nicholas told her that Respondent served approximately 300 people per day. Ms. Tanner observed that the water system consisted of a well, a submersible pump, and two pressure tanks. There were no disinfection equipment or well completion logs located at the facility. She also testified that a sample of Respondent's water showed no chlorine present.

Ms. Tanner testified that the failure to have disinfection equipment constituted a violation of 30 Texas Administrative Code § 290.42(b)(1). That rule states that for water sources involving groundwater, “[d]isinfection facilities shall be provided for all groundwater supplies for the purpose of microbiological control and distribution protection and shall be in conformity with applicable disinfection requirements in subsection (e) of this section.”<sup>4</sup> Subsection (e) provides additional disinfection requirements for groundwater prior to its distribution.<sup>5</sup>

Ms. Tanner stated that Respondent did not have disinfection facilities. Specifically, there was no chlorination system, and a water sample revealed no chlorine in the water at the restaurant.

Respondent argued that, after the investigation, it installed a UV system that should meet this requirement. Respondent stated that the water comes from the Edwards Aquifer and is clean and tastes good. Respondent stated that it did not want to chlorinate the water because it would affect the taste, and Respondent indicated that chlorine was potentially dangerous. Respondent

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<sup>3</sup> A transient noncommunity water system is a “public water system that is not a community water system and serves at least 25 persons at least 60 days out of the year, yet by its characteristics, does not meet the definition of a nontransient noncommunity water system.” 30 Tex. Admin. Code § 290.38(81). A nontransient noncommunity water system is a “public water system that is not a community water system and regularly serves at least 25 of the same persons at least six months out of the year.” *Id.* at 290.38(56). A community water system is a “public water system which has a potential to serve at least 15 residential service connections on a year-round basis or serves at least 25 residents on a year-round basis.” *Id.* at 290.38(15).

<sup>4</sup> *Id.* § 290.42(b)(1).

<sup>5</sup> *Id.* § 290.42(e).

further argued that its operations are sanitary and that no one has ever become sick from drinking its water.

Under the TCEQ's rules, all water obtained from groundwater sources must be disinfected prior to distribution and all water entering the distribution system and water within the distribution system must maintain a residual disinfectant concentration of at least 0.2 mg/L free chlorine or 0.2 mg/L chloramine.<sup>6</sup> These requirements apply to all public water systems. A public water system must receive approval from the ED for an exemption from the rule requirements to implement a treatment system other than a chlorine disinfection treatment system. Respondent conceded that the ED had denied its requests for an exemption.

The ALJ finds that this violation occurred. The rules require a public water system to have disinfection equipment. Ms. Tanner observed no disinfection equipment at the restaurant. Additionally, there was no chlorine present in the water to indicate that disinfection was occurring. Respondent's UV system may provide some amount of treatment to the water, but it does not meet the rule requirements for disinfection, and Respondent has not obtained approval for an exemption from the rules.

Ms. Tanner testified that she also documented a violation of 30 Texas Administrative Code § 290.41(c)(3)(A) by observing that Respondent did not have well completion data at the facility. Ms. Tanner also contacted the TCEQ Technical Review Team, and the team did not have any applicable records. Ms. Tanner stated that Respondent did not have well completion data prior to becoming a public water system. Section 290.41(c)(3)(A) states that:

The construction, disinfection, protection, and testing of a well to be used as a public water supply source must meet the following conditions.

(A) Before placing the well into service, a public water system shall furnish a copy of the well completion data, which includes the following

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<sup>6</sup> *Id.* at § 290.42(e)(2), 290.110(b)(2), (4).



items: the Driller's Log (geological log and material setting report); a cementing certificate; the results of a 36-hour pump test; the results of the microbiological and chemical analysis required by subparagraphs (F) and (G) of this paragraph; a legible copy of the recorded deed or deeds for all real property within 150 feet of the well; a legible copy of the sanitary control easement(s) or other documentation demonstrating compliance with paragraph (1)(F) of this subsection; an original or legible copy of a United States Geological Survey 7.5-minute topographic quadrangle showing the accurate well location to the executive director; and a map demonstrating the well location in relation to surrounding property boundaries. All the documents listed in this paragraph must be approved by the executive director before final approval is granted for the use of the well.

The ED did not provide any evidence that Respondent "placed the well into service" such that it would be required to furnish the listed documents. The evidence showed that Respondent did not have the documents listed in this subsection and that the documents had never been submitted to TCEQ. However, the evidence did not show that Respondent was the entity required to submit and gain approval for those documents. No evidence was provided to show what constitutes placing a well into service, when the well was placed into service, or who placed the well into service. The well may have already been in service when Respondent began operating. The ED established that Respondent was operating the well, but no evidence was presented to show that operating a well equates to placing it into service or that Respondent did anything other than operate the well that would have made the cited rule applicable to this case. Moreover, the mere fact that documents were not submitted to the ED is not evidence that the documents must have been submitted by this particular Respondent. Therefore, the ALJ finds that this violation was not supported by the evidence.

2. **Violations 4 and 5: Failure to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014; failure to provide public notification and submit a copy of the public notification to the Executive Director regarding the failure to sample for June 2013 through December 2013; and failure to collect annual nitrate samples and provide the results to the Executive Director for the 2013 monitoring report.**

Mr. Beauchamp testified regarding a record review investigation of Respondent. Mr. Beauchamp stated that Respondent had not submitted required total coliform sample results to the ED and that Respondent had not provided the required public notices for its failures to sample. He also stated that Respondent failed to submit results of the required nitrate monitoring. Mr. Beauchamp testified about the various rules that require testing and monitoring, submission of results to TCEQ, and public notice.

The rules require that public water systems collect samples for total coliform, fecal coliform, *E. coli*, or other fecal indicator organisms at locations and frequency as directed by the ED and that all samples be collected during normal operating conditions.<sup>7</sup> Additionally, noncommunity public water systems must collect routine distribution coliform samples at a frequency based on the population served by the system, which depends on the maximum number of persons served on any given day of the month.<sup>8</sup> Respondent is required to take one sample per month based on a population of between 1 and 1,000 served each day.<sup>9</sup>

Respondent is also required to monitor for nitrates. Under 30 Texas Administrative Code § 290.106, all public water systems shall annually sample for nitrates at each groundwater entry point to the distribution system.<sup>10</sup>

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<sup>7</sup> *Id.* § 290.109(c).

<sup>8</sup> *Id.* at 290.109(c)(2)(A)(i).

<sup>9</sup> *Id.* at 290.109(c)(2)(A)(iii); *see also* Tex. Health & Safety Code § 341.033(d).

<sup>10</sup> 30 Tex. Admin. Code § 290.106(c)(6).

Mr. Beauchamp testified that Respondent failed to provide the required public notice of its failure to sample and failed to submit a copy of the public notification to the ED, in violation of 30 Texas Administrative Code § 290.122(c)(2)(A) and (f). Those rules require that the owner or operator of a public water system that fails to perform required monitoring must notify persons served by the system.<sup>11</sup> Specifically, the initial public notice shall be issued within three months of the failure to sample, and, for a noncommunity water system, the notice shall be issued by either posting the notice in a conspicuous location frequented by persons served by the system or by mail, by direct delivery to each customer and service connection, or by electronic delivery or alert systems such as reverse 911.<sup>12</sup> Additionally, a copy of the public notice must be submitted to the ED within ten days of its distribution as proof of public notification.<sup>13</sup>

Mr. Beauchamp testified that the required sample results had not been submitted to the ED by Respondent. No proof of public notice of the failure to sample had been submitted, either.

Based on the evidence, the ALJ finds that these violations occurred. Respondent was required to conduct sampling, the required sampling was not conducted, and the required notices were not provided to the customers or submitted to the ED.

**3. Violation 2: Failure to submit plans and specifications to the Executive Director for review and approval prior to the establishment of a new public water supply.**

Ms. Garza testified that this violation was added by the Enforcement Division during her review of the case. After reviewing the investigation report's recommended corrective action of submitting plans and specifications to the ED, she determined Respondent had violated Texas Health and Safety Code § 341.035(a) and 30 Texas Administrative Code §§ 290.39(e)(1) and

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<sup>11</sup> *Id.* § 290.122(c).

<sup>12</sup> *Id.* at 290.122(c)(2)(A).

<sup>13</sup> *Id.* at 290.122(f).

(h)(1). She noted that the violation was added in accordance with Enforcement Division policies.

Texas Health and Safety Code § 341.035(a) requires that “a person may not begin construction of a public drinking water supply system unless the executive director of the commission approves: (1) a business plan for the system; and (2) the plans and specifications for the system.” TCEQ rules require that “[e]ngineering reports are required for new water systems. . . . Engineering reports are also required when design or capacity deficiencies are identified in an existing system.”<sup>14</sup> Additionally,

[n]o person may begin construction on a new public water system before receiving written approval of plans and specifications and, if required, approval of a business plan from the executive director. No person may begin construction or modifications to a public water system without providing notification to the executive director and submitting and receiving approval of plans and specifications if requested in accordance with subsection (j) of this section.<sup>15</sup>

The ED did not allege, and presented no evidence to establish, that Respondent constructed the public water system located at its restaurant. No evidence was presented to establish when the well was constructed or who constructed it. No evidence was presented on whether Respondent’s restaurant was operating when the well was constructed. Rather, the ED’s justification for this violation was the recommended corrective action in the investigation report. However, a recommended corrective action is not evidence that a violation occurred. Moreover, the ED did not allege any other basis for requiring submission and approval of plans and specifications such as modification to the system. The ED showed that Respondent had not submitted plans and specifications, but that in itself does not establish that Respondent was required to do so. Therefore, the ALJ finds that the ED did not meet his burden of proof to establish that this violation occurred.

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<sup>14</sup> *Id.* § 290.39(e)(1).

<sup>15</sup> *Id.* at § 290.39(h)(1). Subsection (j) involves significant changes or additions to a public water system’s production, treatment, storage, pressure maintenance, or distribution facilities. *Id.* at § 290.29(j).

#### IV. PROPOSED PENALTY AND CORRECTIVE ACTION

Respondent stipulated that, if the ALJ finds that the violations occurred, the ED's penalty is correct. The penalty recommended by the ED is \$3,391. A penalty of \$50 was recommended for Respondent's alleged violation of 30 Texas Administrative Code 290.39(e)(1) and (h)(1) and Texas Health and Safety Code § 341.035(a). A \$50 penalty was also recommended for Respondent's alleged violation of 30 Texas Administrative Code § 290.41(c)(3)(A). Therefore, the ALJ recommends assessment of a penalty of \$3,291, which is the ED's recommended penalty minus the penalties for these unproven violations.

The ED also seeks corrective action in this matter. As corrective action, the ED seeks to require that Respondent install and begin operating disinfection facilities; begin collecting routine distribution coliform samples; implement procedures to ensure that all necessary public notifications are provided and that copies are submitted to the ED; implement procedures to ensure that all future nitrate samples are collected; submit as-built plans, specifications, and engineering reports to the ED; submit well completion data to the ED; obtain approval for the as-built plans and well completion data from the ED; and provide written certification for each corrective action.

Because the ED did not meet its burden of proof regarding two of the alleged violations, the ALJ finds that corrective actions to address those violations are not appropriate.<sup>16</sup> The ALJ finds that the remaining corrective actions, however, are appropriate and necessary to address Respondent's violations.


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<sup>16</sup> The ALJ notes that, regardless of the corrective actions ordered in this case, 30 Texas Administrative Code § 290.46(n) requires a public water system to maintain on file certain records and make the records available to the ED upon request. These records include plans, specifications, and well completion data. 30 Tex. Admin. Code § 290.46(n).

## V. SUMMARY

The ALJ recommends that the Commission adopt the attached proposed order assessing Respondent a penalty of \$3,291 for the violations proven in this case and requiring Respondent to take the corrective actions necessary to correct the proven violations.

**SIGNED August 13, 2015.**

  
\_\_\_\_\_  
STEPHANIE FRAZER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**AN ORDER ASSESSING ADMINISTRATIVE PENALTIES AGAINST  
HILL TOP CAFE, INC.  
TCEQ DOCKET NO. 2013-1005-PWS-E  
SOAH DOCKET NO. 582-15-1629**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against Hill Top Cafe, Inc. (Respondent). Stephanie Frazee, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted an evidentiary hearing on this matter on June 25, 2015, in Austin, Texas, and presented the proposal for decision.

The following are parties to the proceeding: Respondent, the Commission's Executive Director (ED), and the Office of Public Interest Counsel.

After considering the ALJ's proposal for decision, the Commission adopts the following findings of fact and conclusions of law.

## **I. FINDINGS OF FACT**

1. Respondent operates a restaurant with a well that provides water for drinking, food preparation and cooking, and washing dishes and hands located at 10661 North U.S. Highway 87, Doss, Gillespie County, Texas.
2. Respondent serves approximately 300 people per day.
3. Respondent provides water for human consumption and serves at least 25 people per day for at least 60 days per year.
4. Respondent owns and operate a public water system.
5. The ED conducted an on-site investigation on March 22, 2013, and a record review investigation from April 27 through May 9, 2014, and documented violations.
6. Respondent failed to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection.
7. Respondent failed to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014 and failed to provide public notification and submit a copy of the public notification to the ED regarding the failure to sample for June 2013 through December 2013.
8. Respondent failed to collect annual nitrate samples and provide the results to the ED for the 2013 monitoring period.
9. On May 8, 2013, the ED issued a Notice of Enforcement.
10. On October 6, 2014, the ED issued the EDPRP alleging Respondent committed the following violations:
  - a. Failure to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection, in violation of 30 Texas Administrative Code § 290.42(b)(1);
  - b. Failure to submit plans and specifications to the ED for review and approval prior to the establishment of a new public water supply, in violation of Texas Health and Safety Code § 341.035(a) and 30 Texas Administrative Code § 290.39(e)(1) and (h)(1);
  - c. Failure to submit well completion data to the ED for review and approval prior to placing a well into service as a public water supply source, in violation of 30 Texas Administrative Code § 290.41(c)(3)(A);



- d. Failure to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014 and failure to provide public notification and submit a copy of the public notification to the ED regarding the failure to sample for June 2013 through December 2013, in violation of Texas Health and Safety Code § 341.033(d) and 30 Texas Administrative Code §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(A) and (f); and
  - e. Failure to collect annual nitrate samples and provide the results to the ED for the 2013 monitoring report, in violation of 30 Texas Administrative Code § 290.106(c)(6).
- 11. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2011.
  - 12. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective April 1, 2014.
  - 13. The ED recommends the imposition of an administrative penalty in the amount of \$3,391 and corrective action to bring Respondent into compliance.
  - 14. Respondent stipulated that, if the alleged violations occurred, the ED's proposed penalty was calculated accurately and correctly.
  - 15. On October 27, 2014, Respondent requested a contested case hearing on the allegations in the EDPRP.
  - 16. On December 9, 2014, the case was referred to SOAH for a hearing.
  - 17. On December 18, 2014, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
  - 18. ALJ Stephanie Frazee convened the hearing on the merits on June 25, 2015, in SOAH's hearing rooms in Austin, Texas.
  - 19. The ED was represented by staff attorney Jake Marx, and John Nicholas, Respondent's President and Director, appeared on behalf of Respondent. The Office of Public Interest Counsel did not appear.
  - 20. The record closed at the end of the hearing on June 25, 2015.

## II. CONCLUSIONS OF LAW

1. The Commission may assess an administrative penalty against a person who violates a provision of the Texas Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder. Tex. Health & Safety Code § 341.049.
2. Respondent is subject to the Commission's enforcement authority. Tex. Water Code § 7.002.
3. Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations and the penalties and the corrective action proposed therein. Tex. Water Code § 7.055; 30 Tex. Admin. Code §§ 1.11, 70.104.
4. Respondent was properly notified of the hearing on the alleged violations and the proposed penalties and corrective action. Tex. Gov't Code §§ 2001.051-.052; Tex. Water Code § 7.058; 1 Tex. Admin. Code § 155.401; 30 Tex. Admin. Code §§ 1.11-.12, 39.25, 70.104, 80.6.
5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
6. The ED has the burden of proof by a preponderance of the evidence in an enforcement proceeding. 30 Tex. Admin. Code § 80.17(d).
7. As shown by the findings of fact, Respondent violated 30 Texas Administrative Code § 290.42(b)(1) by failing to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection.
8. As shown by the findings of fact, Respondent violated Texas Health and Safety Code § 341.033(d) and 30 Texas Administrative Code §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(A) and (f) by failing to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014 and failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to sample for June 2013 through December 2013.
9. As shown by the findings of fact, Respondent violated 30 Texas Administrative Code § 290.106(c)(6) by failing to collect annual nitrate samples and provide the results to the ED for the 2013 monitoring period.
10. The evidence does not show that Respondent violated Texas Health and Safety Code § 341.035(a) and 30 Texas Administrative Code §§ 290.39(e)(1) and (h)(1) and 290.41(c)(3)(A), as alleged by the ED.

11. In determining the amount of an administrative penalty, Texas Health and Safety Code § 341.049 requires the Commission to consider several factors, including the history and extent of previous violations by the violator; the violator's degree of culpability, good faith, and economic benefit gained through the violation; the amount necessary to deter future violations; and any other matters that justice may require.
12. Based on consideration of the above findings of fact and conclusions of law, the factors set out in Texas Health and Safety Code § 341.049 and the Commission's Penalty Policy, a total administrative penalty of \$3,291 is justified and should be assessed against Respondent, and Respondent should be required to implement the corrective actions set out below.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Hill Top Cafe, Inc. is assessed an administrative penalty of \$3,291 for the violations of state statutes and rules of the TCEQ considered in this case. The payment of this administrative penalty and Hill Top Cafe, Inc.'s compliance with all the terms and conditions set forth in this Order resolve only the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from considering or requiring corrective actions or penalties for violations that are not raised here. Administrative penalty payments shall be made payable to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: HILL TOP CAFE, INC., Docket No. 2013-1005-PWS-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

2. Within 10 days after the effective date of this Order, Respondent shall install and begin operating disinfection facilities to continuously maintain an adequate disinfection residual throughout the distribution system for the purpose of microbiological control and distribution protection, in accordance with 30 Texas Administrative Code § 290.42.
3. Within 25 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 7, below, to demonstrate compliance with Order Provision No. 2.
4. Within 30 days after the effective date of this Order, Respondent shall:

- a. Begin complying with applicable coliform monitoring requirements by collecting routine distribution samples and providing water that meets the provisions regarding microbial contaminants, in accordance with 30 Texas Administrative Code § 290.109. This provision will be satisfied upon six consecutive months of compliant monitoring and reporting.
  - b. Implement procedures to ensure that all necessary public notifications are provided in a timely manner to persons served by Respondent and a copy of the public notification is submitted to the ED, including providing public notification regarding the failure to conduct routine coliform monitoring during the months of June 2013 through December 2013, in accordance with 30 Texas Administrative Code § 290.122; and
  - c. Implement improvements to Respondent's process, procedures, guidance, training, and/or oversight to ensure that all future nitrate samples are collected, analyzed by an approved laboratory, and the results reported to the ED within ten days following the end of each monitoring period, in accordance with 30 Texas Administrative Code § 290.106 (Inorganic Contaminants).
5. Within 45 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 7, below, to demonstrate compliance with Order Provision Nos. 4.b. and 4.c.
  6. Within 225 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Order Provision No. 7, below, to demonstrate compliance with Ordering Provision No. 4.a.
  7. The certifications required by these Ordering Provisions shall be accompanied by detailed supporting documentation, including photographs, receipts, and/or other records, shall be notarized by a State of Texas Notary Public, and shall include the following certification language:

I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Respondent shall submit the written certifications and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team  
Enforcement Division, MC 148A  
Texas Commission on Environmental Quality

P.O. Box 13087  
Austin, Texas 78711-3087

and:

Section Manager  
Public Drinking Water Section, MC 155  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

8. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
9. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
10. The effective date of this Order is the date the Order is final, as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.
11. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
12. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

Issue Date:

**TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman for the Commission**